

Ky. Op. Atty. Gen. 08-ORD-139, 2008 WL 2928125 (Ky.A.G.)

Office of the Attorney General  
Commonwealth of Kentucky

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July 14, 2008

In re: Ronald R. Van Stockum, Jr./North Shelby Water Company

**Summary:** North Shelby Water Company, a private nonprofit corporation, is accountable through its records under [KRS 61.870\(1\)\(h\)](#) of the Open Records Act to the extent those records relate to a 1.5 million dollar grant it received from the state. Because it has not received, and does not expect to receive, any other state or local funds in the current fiscal year, its remaining records are not subject to public inspection.

***Open Records Decision***

The question presented in this appeal is whether the North Shelby Water Company is a public agency for purposes of the Open Records Act and therefore required to produce for inspection records relating to the Louisville Water Company and a proposed pipeline through Shelby County and the U.S. 60 Water District. [FN1] On behalf of Shelby County Organized for Preservation and Enhancement, Inc., Ronald R. Van Stockum, Jr., requested these records on April 3, 2008, and again on April 28, 2008. Mr. Van Stockum's requests went unanswered prompting him to initiate this appeal.

On June 24, 2008, Donald T. Prather notified this office that the North Shelby Water Company is a private nonprofit corporation and that "it is not subject to the open records law." Upon further inquiry, we were advised that the members of the North Shelby Board of Directors are elected by the company's customers and not appointed by a public agency or public official. Continuing, Mr. Prather observed:

We believe Mr. Van Stockum's request is directed toward information regarding the proposed water transmission main to be constructed by Louisville Water Company and/or other entities along the I-64 Corridor from Eastern Jefferson County to Shelbyville and perhaps the City of Frankfort. North Shelby has not received any funds, a grant or otherwise, regarding this proposed project, whether federal, state or local.

More specifically, we believe Mr. Van Stockum's request is directed towards a "task force" which has been informally meeting for some time regarding this proposed Louisville Water Company I-64 transmission main. Mr. Van Stockum has been invited by the president of Louisville Water Company to attend these meetings, but has thus far failed to do so. He remains welcome to attend these meetings. [FN2]

On this basis, he asserted, Mr. Van Stockum is not entitled to records relating to the proposed water transmission main pursuant to [KRS 61.870\(1\)\(h\)](#) and [KRS 61.870\(2\)](#).

Mr. Prather acknowledged that North Shelby has received a 1.5 million dollar grant from the Commonwealth of Kentucky for the construction of a 12 inch water transmission main that will connect with the Louisville Water Company System. He did not indicate in what year North Shelby received those funds or what percentage of its total budget they represent, but conceded that the Open Records Act applies to any North Shelby records relating to the 12 inch transmission line and agreed to mail copies of the grant agreement and associated documents to Mr. Van Stockum. He asserted that North Shelby “has not received, and does not expect to receive, any other... state or local funds for construction or other purposes during its current fiscal year,” and denied Mr. Van Stockum access to all other records of the North Shelby Water Company that are not related to functions, activities, programs, or operations funded by state or local authority. Having belatedly disclosed the records to which Mr. Van Stockum was entitled, we find no error in the ultimate disposition of his request.

[KRS 61.872](#)(1) provides that “[a]ll public records shall be open for inspection by any person... and suitable facilities shall be made available by each public agency for the exercise of this right.” The term “public record” is defined at [KRS 61.870](#)(2) as:

all books, papers, maps, photographs, cards, tapes, discs, diskettes, recordings, software, or other documentation regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency. “Public record” shall not include any records owned or maintained by or for a body referred to in subsection (1)(h) of this section that are not related to functions, activities, programs, or operations funded by state or local authority.

Resolution of the question whether the records of the North Shelby Water Company are public records, and must be made available for public inspection, turns on whether North Shelby is a “public agency” as defined in [KRS 61.870](#)(1)(a) through (k).

The term “public agency” is broadly defined to include:

- (a) Every state or local government officer;
- (b) Every state or local government department, division, bureau, board, commission, and authority;
- (c) Every state or local legislative board, commission, committee, and officer;
- (d) Every county and city governing body, council, school district board, special district board, and municipal corporation;
- (e) Every state or local court or judicial agency;
- (f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
- (g) Any body created by state or local authority in any branch of government;
- (h) Any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;
- (i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k) of this subsection; by a member or employee of such a public agency; or by any combination thereof;
- (j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and
- (k) Any interagency body of two (2) or more public agencies here each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection[.]

If an entity falls within one or more of these definitional sections, it is subject to the Open Records Act. It is ap-

parent that the North Shelby Water Company does not qualify as a public agency under [KRS 61.870\(1\)\(a\)](#), (b), (c), (d), (e), (f), (g), (i), (j), or (k). It is equally apparent that it can be characterized as a “public agency” for purposes of the Open Records Act only if it “derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.” [KRS 61.870\(1\)\(h\)](#). If so, it is accountable through its records to the extent of its public funding. [KRS 61.870\(2\)](#).

The Attorney General has long recognized that the Open Records Act applies to a private nonprofit corporation if it receives 25 percent or more of its funds from state or local authority. OAG 81-377; OAG 82-216; OAG 84-237; OAG 88-61; 92-ORD-1114; 94-ORD-98; 96-ORD-99; 97-ORD-65. Where evidence is introduced that the corporation receives less than 25 percent of its funds from state or local authority, the Attorney General has held that it cannot properly be characterized as a public agency. 93-ORD-90; 96-ORD-127.

This office has opined that a water association organized under KRS Chapter 273 as a nonprofit corporation is not a political subdivision, agent of a political subdivision, or special district. OAG 77-524. Such corporations are not public agencies for purposes of the *Open Meetings Act*. 96-OMD-180. As noted, such corporations are public agencies for purposes of the *Open Records Act* only if they derive at least 25 percent of their funds from state or local authority. OAG 78-395; OAG 91-48.

The record on appeal confirms that the North Shelby Water Company is accountable through its records to the extent of the 1.5 million dollar grant it received from the state. Mr. Van Stockum is entitled to inspect all records related to functions, activities, programs, or operations funded by this grant. The record further confirms that North Shelby has not received, and does not expect to receive, any other state or local funds in the current fiscal year. Mr. Van Stockum is not entitled to inspect its remaining records inasmuch as those records are not public records for open records purposes.

Although Mr. Van Stockum enjoys a limited right of access to the North Shelby Water Company's records, he may inspect any nonexempt records relating to the proposed water transmission main to be constructed by the Louisville Water Company in that public agency's custody. As noted, the Louisville Water Company's status as a public agency for open records purposes has been firmly established, [\[FN3\]](#) and Mr. Van Stockum may be able to glean the information he seeks from that agency's records.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.880\(5\)](#) and [KRS 61.882](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Jack Conway  
Attorney General

Amye L. Bensenhaver  
Assistant Attorney General

[\[FN1\]](#). Specifically, Mr. Van Stockum requested access to records relating to:

1. The Louisville Water Company and the proposed extension of its service to or through Shelby County and/or Frankfort, KY and
2. The Shelbyville Municipal Water and Sewer Commission. North Shelby Water Company, US 60 Water District, and/or West Shelby Water District and the Louisville Water Company in relation to (1) above.

Additionally, he requested access to:

1) the Articles of Incorporation; 2) Bylaws; and 3) minutes of all meetings of the North Shelby Water Company during the past three years, whether or not related to the previous requests.

[FN2]. Although the status of the Louisville Water Company as a public agency for open records purposes has been firmly established, its status as a public agency for open meetings has not. Nevertheless, Mr. Prather's statements about meetings of the Louisville Water Company's task force raise the issue of compliance with the provisions of the Open Meetings Act.

[FN3]. See, e.g., 97-ORD-47; 04-ORD-169; 05-ORD-067.

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